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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1972

NO. 72-

GEORGE E. STRIPLING, et als.,
Petitioners

versus

LINDA STOUT, et als.,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioners, GEORGE E. STRIPLING, and others, respectfully pray that a writ of certiorari be issued out of and under the seal of this Court to review the judgment of the United States Court of Appeals for the Fifth Circuit rendered on the 7th day of September, 1972, which *affirmed* a judgment and order of the United States District Court for the Northern District of Alabama, a single judge court, declaring Act No. 1418, Regular Session, Legislature of Alabama, 1971, unconstitutional, and further enjoining petitioners, from relying upon said Act No. 1418.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit has not been reported as yet.

A copy of the pertinent part of this opinion relating to the issues herein presented is attached hereto as Appendix "A", p. A-1, *infra.*

The United States District Court for the Northern District of Alabama, in Civil Action 65-396, rendered an opinion and order, and the pertinent parts of this opinion are attached hereto in Appendix "A", pp. A-2 thru A-8, *infra.*

JURISDICTION

No formal judgment of the United States Court of Appeals for the Fifth Circuit was entered, but see opinion above dated September 7, 1972.

The statutory provision believed to confer jurisdiction upon this Court to review the judgment in question is 28 U.S. C. 1254 (1.)

QUESTIONS PRESENTED FOR REVIEW

1. Did the United States District Court for the Northern District of Alabama have before it a "case or controversy", according to Article III, Section 2, United States Constitution, involving Act No. 1418, Regular Session, Legislature of Alabama, 1971?

2. Was the United States District Court for the Northern District of Alabama authorized to determine the constitutionality of Act No. 1418, Regular Session, Legislature of Alabama, 1971, without the convening of a three-judge court pursuant to 28 U.S.C. 2281?

3. Was the United States District Court for the Northern District of Alabama, assuming it possessed the necessary jurisdiction as a one judge court to determine the constitutionality of Act 1418, Regular Session, Legislature of Alabama, 1971, correct in its decision, as affirmed by the United States Court of Appeals for the Fifth Circuit, that such Act No. 1418 was patently and on its face unconstitutional?

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES INVOLVED

A.

Act No. 1418, Regular Session, Legislature of Alabama, 1971, approved by the Governor on September 23, 1971, reads as follows:

> "An Act, To prohibit the denial of admission of any child to any public school in this State under certain conditions.
>
> "*Section 1.* No student shall be denied admission to any public school in this State when, in the determination of such child's parents or legal guardian, the time or distance of travel to another school is so great as to risk the health or safety of the child or significantly impinge on the educational process.
>
> "*Section 2.* Upon a determination being made that the time or distance of travel to another school is so great as to risk the health or safety of the child or significantly impinge on the educational process, the parent or guardian shall make written application to the authorities of the

school to which the child is to be admitted, and the school authorities shall thereupon admit said child.

"*Section 3.* All laws or parts of laws which conflict with this Act are hereby repealed.

"*Section 4.* This Act shall become effective immediately upon its passage and approval by the Governor, or upon its otherwise becoming a law."

B.

Other constitutional provisions, statutes, and rules involved herein are set forth below in Appendix "B", pp. B-1, *et seq.*

STATEMENT OF THE CASE

Prior to the enactment into law of Act No. 1418, an AMENDED ORDER dated September 8, 1971, detailing school attendance zones for schools under the jurisdiction of the Jefferson County Board of Education in the *Linda Stout* case was filed in the United States District Court for the Northern District of Alabama. This AMENDED ORDER affected the children of petitioners by prescribing the schools which each should attend.

On October 18, 1971, petitioner GEORGE E. STRIPLING filed in the Circuit Court, Tenth Judicial Circuit of Alabama, Jefferson County, in Equity, his bill of complaint for both a temporary and mandatory injunction, being Case No. 168-839. On the same date in the same court and seeking like relief, petitioner CHARLES OWENS, and others, filed their bill, being Case No. 168-840.

In both bills for injunction the complainants detailed the factors upon which they, as parents, had made the determination required by Section 2 of Act 1418, and they sought a mandatory injunction to require respondent Jefferson County Board of Education to comply with the remaining portion of Section 2 of Act No. 1418 concerning admittance to a particular school.

The factors listed in the GEORGE E. STRIPLING case upon which the parental determination had been made were:

> "A. Zinnerman School (the AMENDED ORDER assigned school) is located approximately 4½ miles past Concord School (the neighborhood school), requiring a travel time of approximately 25 to 30 minutes. This daily additional travel of nine miles requires an additional 50 minutes to 1 hour of time. The travel time, from the home of GEORGE E. STRIPLING, to Concord School is approximately 10 to 15 minutes.
>
> "B. The additional travel to Zinnerman School requires that the school bus enter into Warrior Road, which road is a main artery of travel for many automobiles transporting persons at that time of the morning to Hueytown, Bessemer, Fairfield, and Birmingham. The route to Concord School does not entail entering or traveling any heavily utilized road.
>
> "C. After the daughter of GEORGE E. STRIPLING had ridden the school bus to Zinnerman School on several occasions she developed a nervous condition, which condition had not existed previously, and which required medical attention, and still requires medical attention."

The factors delineated in the CHARLIE OWENS, and others, case are as follows:

"A. Owens Children:

"1. From the home of the Owens children to Moton School (AMENDED ORDER assigned school) is 7 miles. From their home to Leeds Elementary School (neighborhood school) is 5 miles.

"2. The bus in which they ride has to cross two dangerous railroad crossings to get to Moton School.

"3. The school bus which they ride goes along Interstate Highway 20, which is a heavily traveled highway for 4 miles before it turns off on to Highway 78. The return trip is the same.

"4. In the mornings, before boarding the school bus, the children have to cross I-20, and then board the bus. The children's Mother has to cross I-20 with the children and there are no signs which say "all traffic stop while school buses load and unload" and traffic along said highway does not stop, and the speed limit along said I-20 is 70 miles per hour.

"5. The children have to leave home at 7:00 a.m. and do not return until approximately 4:00 p.m., a nine hour interval.

"6. The Moton School is situated in a undesirable area in the County and is not adequately patrolled by law enforcement officers.

"7. The children's bus in the afternoon, makes one run from the school, and returns to pick up the children for the second run and to the childrens place of de-boarding the bus which is on I-20.

"While waiting for the bus, the children are without school guidance or school protection.

"B. The Caldwell Child:

"1. From the home of Caldwell to Moton School is 11 miles and from his home to Leeds is 9 miles.

"2. The child has to leave home at 6:30 a.m. to board the bus to school and does not return until approximately 4:00 p.m.

"3. The ride to Leeds school is only 10 minutes from Caldwell's house and to Moton School takes approximately 30 minutes each way.

"4. The bus travels along a heavily travelled highway and has to cross two dangerous railroad crossings each way to and from Moton School.

"5. In the afternoon, Caldwell has to wait for the second load of children and in the meantime, the Caldwell child is without school guidance or protection.

"6. The school bus goes by Leeds School before it gets to Moton School.

"C. The McDaniel Child:

"1. The McDaniel child lives in the Lovick Community, and the bus travels two miles before reaching I-20. Upon reaching I-20, the bus has to cross two lanes of heavy traffic, stop at the median and then turn left on the other two lanes of heavy

"traffic and proceed along I-20 for 4 more miles before turning off on to Highway 78, and proceed to Moton School and then before getting to Moton School has to cross 2 dangerous railroad crossings.

"2. The school bus appears to be in bad condition and constitutes a danger and threat to the health and safety of McDaniel's child.

"3. The ride to Leeds by bus is 7 miles. The distance to Moton School is 9 miles.

"4. The McDaniel child has to catch the second load of children for his return home from the school in the afternoon, and as above stated, the child is without school supervision while awaiting the bus to go home.

"5. The return home is along the same dangerous route, i.e. the dangerous railroad crossings and the heavily travelled interstate where there are no signs to warn traffic of school buses."

Upon being presented with the verified bill of complaint in each case, the Honorable William C. Barber, Judge, Tenth Judicial Circuit of Alabama, in Equity Sitting, on October 18, 1971, ordered "that a temporary injunction shall forthwith issue to the respondents in accordance with the prayer of the Bill of Complaint." *I. e,* the STRIPLING child was to be admitted to Concord School, and the other children were to be admitted to Leeds Elementary School. The temporary mandatory injunctions issued according to the terms of these fiats of Judge Barber.

In its ANSWER TO BILL FOR TEMPORARY AND PERMANENT MANDATORY INJUNCTION

filed October 20, 1971, in each of Cases Nos. 168-839 and 168-840, Jefferson County Board of Education neither admitted nor denied the factors upon which the parental determinations were based and demanded proof thereof. The transfers prayed for had been approved.

In its AMENDMENT TO ANSWER TO BILL FOR TEMPORARY AND PERMANENT MANDATORY INJUNCTION filed October 29, 1971, the Jefferson County Board of Education added the following:

> "7. Respondents admit passage and approval of Act No. 1418 by the 1971 Legislature of Alabama, which said Act, as averred in paragraph 3, was approved on, to-wit, September 23, 1971. Under the Declaratory Judgment Act of Alabama (Title 7, Section 156, et seq., *1958 Recompiled Code of Alabama*) respondents request and move the Court for a declaration whether said Act is constitutional. Respondents aver that such declaration and determination by this Court is needed and required for their administration of the duties imposed upon them thereunder."
>
> • • •
>
> "Respondents respectfully move the Court and pray for a declaration of the validity, applicability and constitutionality of Act No. 1418 adopted by the 1971 Session of the Legislature of Alabama and approved September 23, 1971."

The pertinent portion of each final decree rendered on November 1, 1971, by Judge William C. Barber is as follows:

"* * *The substantive facts involved are not disputed.(1) The question involved is the applicability and constitutionality of Act No. 1418 of the 1971 Session of the Legislature of Alabama approved September 23, 1971 and set out in paragraph 3 of the verified bill. The respondents request a declaration of the applicability and validity of said Act under Title 7, Section 156, et seq. of the *1958 Recompiled Code of Alabama.*

"The Court finds that it has jurisdiction of the parties and issues here involved and raised by the pleadings, and specifically that *the parent of the student, in good faith, has made the determination provided and required by Act 1418, and that said determination is factually correct;* that the time or distance of travel to the school to which said student was previously assigned was 'so great as to risk the health or safety of the child or significantly impinge on the educational process'. (Emphasis supplied)

* * *

---

(1). As an aside, Judge Sam C. Pointer, Jr., in his MEMORANDUM OF OPINION AND ORDER dated December 3, 1971, obliquely casts a judicial frown upon the final decree of November 1, 1971, issued by Judge Barber by referring to the affidavits as "nothing". Judge Pointer cites *Board of Water & Sewer Comm'rs v. Spriggs*, 274 Ala 155, 146 So2d 872(1962). It has always appeared to be the rule that federal courts cannot control state court procedure (in the absence of federal constitutional violations), and the affidavits were a matter of Alabama procedure. Furthermore, *Spriggs* referred ONLY to a temporary injunction; the final decrees were the issuance of permanent mandatory injunctions. A bill for a permanent injunction in Alabama does NOT have to be verified; Judge Barber cannot be faulted for accepting the affidavits as ample proof for the issuance of permanent injunctions.

"* * * * It is, therefore, ORDERED, ADJUDGED and DECREED by the Court that:

"1. Said Act No. 1418 is constitutional and applies to and controls the transfer herein sought and ordered."

Meanwhile, the United States, as plaintiff-intervenor in the *Linda Stout* case, filed its PETITION FOR REMOVAL AND CONSOLIDATION on October 18, 1971, and, after setting forth the filing of the bills for temporary and permanent injunctions described above, sought an order:

"1. Removing to this Court the cases of *George Stripling v. Jefferson County Board of Education*, No. 168-839, and *Charles Owens, et al., v. Jefferson County Board of Education*, No. 168-840; as provided for by Title 28 §§ 1442 (a) (1), 1443 (2) and 1651.

"2. Vacating the Writs of Injunction entered in these cases on October 18, 1971.

"3. Consolidating the cases of *George Stripling v. Jefferson County Board of Education*, No. 168-839, and *Charles Owens, et al., v. Jefferson County Board of Education*, No. 168-840, with this case.

"4. The United States prays for such other and further relief as may be necessary or appropriate in aid of this Court's jurisdiction, pursuant to 28 U.S.C. § 1651."

EVEN THOUGH ADDITIONAL RELIEF WAS SOUGHT BESIDES A REMOVAL, THERE WAS NO SERVICE OF THIS PETITION on these petitioners here.

Also Linda Stout filed a pleading denominated MOTION FOR EMERGENCY RELIEF, dated October 26, 1971. After setting out the above matters, Linda Stout asked of the Court:

> "WHEREFORE, PREMISES CONSIDERED, plaintiff prays this Court will issue an order declaring Act 1418 of the 1971 Regular Session of the Alabama Legislature to be null, void and of no effect in the Jefferson County School system; and directing the defendants to disregard and ignore the said Act 1418 as it relates to student assignments and transfers in the Jefferson County school system***."

THERE WAS NO SERVICE OF THIS PETITION ON THESE PETITIONERS HERE.

The United States District Court for the Northern District of Alabama considered these pleadings, and, on October 29, 1971, entered an ORDER, filed November 1, 1971. (It will be noted that the final decrees in the state court cases were dated and filed November 1, 1971.) The thrust of this ORDER was for petitioners here to show cause:

> "***why an injunction should not be granted *** under the provisions of 28 U.S.C. § 2283 staying proceedings in such cases (Equity Nos. 168-839 and 168-840) and directing such parties not to enforce or be bound by such proceedings or any orders issued thereunder and not to further prosecute or defend such proceedings."

Thereupon, petitioners STRIPLING and OWENS, and others, filed in the United States Court of Appeals

for the Fifth Circuit on or about November 5, 1971, their PETITION FOR WRIT OF MANDAMUS, being Case No. 71-3205. In that petition STRIPLING, and others, stressed that the ORDER dated October 29, 1971, filed November 1, 1971, in fact, was predicated upon the premise that a determination of the constitutionality of Act 1418 was contemplated, and requested the Honorable Sam C. Pointer, Jr., be required to show cause why a three-judge court should not be convened for the determination of this question according to Title 28, § 2284, United States Code. This petition was denied on November 12, 1971.

Petitioners STRIPLING and OWENS, and others, in response to ORDER of October 29, 1971, filed November 1, 1971, did, on November 15, 1971, enter as a defense the plea of *res judicata* for that the Circuit Court, Tenth Judicial Circuit of Alabama, in Equity, had on November 1, 1971, declared Act No. 1418 constitutional.

Thereupon, on November 24, 1971, a NOTICE was forwarded by the clerk of the United States District Court for the Northern District of Alabama to the Governor and Attorney General of Alabama, which in pertinent part is as follows:

> "Please take notice that the Court will receive on or before December 3, 1971, briefs or other legal memoranda from your office in support of the Constitutionality of Act No. 1418, 1971 Regular Session of the Alabama Legislature. ***The Constitutionality of this Act may be involved in

"an ancillary proceeding now pending in this Court as a part of the above styled cause.* * *"(2)

PETITIONERS WERE NOT AT ANY TIME INVITED TO PRESENT TO THE COURT THEIR BRIEFS OR MEMORANDA IN SUPPORT OF THE CONSTITUTIONALITY OF ACT NO. 1418!

Furthermore, on November 15, 1971, the Jefferson County Board of Education filed pleadings denominated SPECIAL APPEARANCE AND MOTION TO STRIKE PETITION FOR REMOVAL AND CONSOLIDATION; MOTION TO REMAND; and RESPONSE TO ORDER DATED OCTOBER 29, 1971 AND FILED IN THE CLERK'S OFFICE ON NOVEMBER 1, 1971.

In its SPECIAL APPEARANCE AND MOTION TO STRIKE PETITION FOR REMOVAL AND CONSOLIDATION, the Jefferson County Board of Education properly pointed out to the Court that removal was not available to the United States since it was not a party to the state court actions, citing 28 U.S.C.A., Section 1446(a) and (b).

In its MOTION TO REMAND, predicated upon a removal in fact, the Jefferson County Board of Education sought a remand based upon the following grounds, among others:

---

(2)The fact that Judge Pointer did not actually accord the Governor and Attorney General an opportunity to support the constitutionality of Act No. 1418 has been the subject for investigation by the Senate Committee on the Judiciary.

"6. The relief sought in said state cases is consistent with the orders previously rendered in Civil Action 65-396-S by this Court.

"7. The transfers ordered in the state proceedings clearly fall within the 'hardship quota' established in orders of this Court rendered in CA 65-396-S on August 24, 1971 and September 8, 1971.

"8. It is the duty of this Court to reconcile federal and state jurisdictional action, wherever possible, and to avoid any conflict of jurisdiction or authority. The orders of this Court and the relief sought in the state court are consistent and can be reconciled with orders rendered or requested in the separate jurisdictions."

In its RESPONSE TO ORDER DATED OCTOBER 29, 1971, AND FILED NOVEMBER 1, 1971, the Jefferson County Board of Education stated, *inter alia*:

"3***to enjoin parties to a state action from 'further prosecuting or defending such proceedings' would be an unjustified and unwarranted conflict between state and federal authority when such conflict can be properly and judicially avoided under proper statutes and in appropriate cases by removal or remandment proceedings.

"4. This Court already has entered a separate order on October 29, 1971 removing from the Board its administrative right to grant hardship transfers commencing with the Spring 1972 semester.

* * *

"6. The transfers approved by the County Board, both in the state proceedings and otherwise, are within the limits prescribed by this Court in prior orders and so reported to the Court."

Without benefit of argument from STRIPLING and OWENS, and others, and under the facade of "ancillary proceedings", the United States District Court for the Northern District of Alabama, the Honorable Sam C. Pointer, Jr., rendered on December 3, 1971, its MEMORANDUM OF OPINION AND ORDER.

The Court quite properly held that the state court cases were not removable:

> "***Suffice it to say, this court, having serious doubts about such a power (inherent non-statutory removal), has declined the government's invitation to issue such an order, preferring instead to proceed under the well-established injunctive powers available under the All Writs Statute. Accordingly, the state court proceedings are not to be treated as removed to the federal forum as such."

The Court then declined to empanel a three-judge court stating:

> "This procedure is not, however, required when, as here, prior decisions make frivolous any claim that the state statutes on its face is not unconstitutional."(3)

The Court then proceeded to ORDER that Act No. 1418 was unconstitutional (Appendix "A", pp. A-2 thru A-8).

---

(3) If this conclusion be true, why were the Governor and Attorney General of Alabama invited to support the constitutionality of Act No. 1418?

The United States Court of Appeals for the Fifth Circuit AFFIRMED, citing two cases as authority, with no discussion (Appendix "A", p. A-1).

REASONS FOR GRANTING THE WRIT

Introduction

At the very heart of this petition is a request that this Court examine the procedures utilized in the United States District Court for the Northern District of Alabama in arriving at its judicial determination that Act No. 1418, Regular Session, Legislature of Alabama, 1971, be unconstitutional.

Expediency should never be a justification for ignoring mandated jurisdictional concepts and established procedural devices. It is submitted that in this case both jurisdictional and procedural requirements were swept aside; and the further ignoring of these requirements can only lead to ultimate disorder and chaos in United States District Courts wheresoever situated.

This is not the time nor the forum to argue the ultimate legality or judicial wisdom of busing orders to achieve racial balance in the schools of this country. Hence, no such argument is advanced, nor is it intended. What is intended, and which should be patent, is a most serious questioning of the *ad hoc* functioning of a United States District Court as a single member administrative school board, which fosters rule by men, and not by law, contrary to all precedents of nearly 200 years of federal courts under the United States Constitution.

I.

THE JUDICIAL POWER OF THE UNITED STATES DISTRICT COURTS EXTENDS ONLY TO "CASES AND CONTROVERSIES"

The first paragraph of Section 2 of Article III, United States Constitution, states the cases to which the judicial power of the United States extends.

> "The judicial Power shall extend to all Cases, in Law and Equity,*** (of certain sorts)."

Later the word "cases" is repeated, and later still the word is "controversies". To be within the federal judicial power, therefore, a matter must be either a "case" or "controversy". This would exclude administrative proceedings. Further, a "case" or "controversy", of necessity by definition, must present an existing dispute between real parties as to present legal rights and be presented in such a manner that the court can act judicially and with finality,

Petitioners here, GEORGE STRIPLING, and others, pose the question: WHO ARE THE PARTIES TO THE ISSUE OF THE CONSTITUTIONALITY OF ACT NO. 1418, AND HOW WAS THIS ISSUE PRESENTED AS A "CASE" OR "CONTROVERSY"?

Linda Stout did raise a question, but where is her standing as a real party in interest to an administrative function of the Jefferson County Board of Education? HOW DID THIS AFFECT HER? It is nowhere demonstrated in the proceedings below that the proceedings in the Tenth Judicial Circuit of Alabama were concerned with her school district or districts.

The issue of the constitutionality of Act No. 1418 was NOT tendered to these petitioners in the ORDER dated October 29, 1971, filed November 1, 1971. Their response to this ORDER did NOT involve the constitutionality of Act No. 1418. Then, patently, *ex mero motu*, the Court decreed Act No. 1418 unconstitutional. A "case" or "controversy" presupposes a properly submitted issue for judicial consideration and determination. No such issue was presented below!

Swann v. Charlotte-Mecklenburg Board of Education, 312 FSupp 503(1970), is instructive as to the procedures which are required to bring before a United States District Court those parties who are necessary to present a "case" or "controversy".

In *Swann*, the federal court plaintiffs in the original federal desegregation case, comparable to *Stout* here, moved the district court to add the state plaintiffs, such as petitioners were here, as additional parties defendant in the federal suit, and to dissolve the *temporary* restraining order. This was granted, and a three-judge court requested. In another state case, the state plaintiffs were made defendents in the federal case, and also the defendants filed a petition for removal. A three-judge court was also requested; empanelled; and the two cases consolidated.

In the lower court in this case, there is no semblance of any such procedure being followed. In fact, and this is most evident, it appears the United States District Court *ex mero motu* made its own issue, and forthwith decided it, and all without parties, particularly these petitioners who were the complainants in the state court suits.

It is submitted *Swann* furnishes a guide for the proper development of a "case" or "controversy", and that guide should be approved by this Court in the interest of preserving the constitutional grant of judicial power.

II.

A THREE-JUDGE UNITED STATES DISTRICT COURT IS REQUIRED TO DECLARE A STATE LEGISLATIVE ACT UNCONSTITUTIONAL

Title 28, Section 2281, United States Code, is clear that a three-judge court is required to declare a state statute unconstitutional. *E. g., Bynum v. Commission*, 410 F2d 173 (CA2, 1969); *Taylor v. Kentucky State Bar*, 424 F2d 478 (CA6, 1970).

Normally, in the Fifth Circuit, it has been the preferred practice, in all but exceptional cases, to initially constitute a three-judge district court to allow it to determine the substantiality of the federal question alleged. See *State of Alabama v. U.S.*, 314 FSupp 1319 (DC, SD, Ala 1970) (It is noted that actually a three-judge court was NOT required in the cited case because the constitutionality of the statute involved had not been questioned!).

Assuming that Linda Stout did present an attack on the constitutionality of Act No. 1418, and did further comply with 28 United States Code, Section 2281, the practice of the Fifth Circuit was not followed, based upon the assumed conclusion that the statute was unconstitutional on its face. In the lower court, the North Carolina *Swann* cases were relied upon heavily to support this conclusion.

Since this aspect of this case is so intertwined with the proposition that the statute was NOT unconstitutional on its face, the Court is requested respectfully to consider the following discussion as being directly applicable to this proposition.

III.

IT IS ONLY WHERE *PRIOR DECISIONS* MAKE UNSUBSTANTIAL OR FRIVOLOUS THE CLAIM THAT A STATE STATUTE ON ITS FACE IS NOT UNCONSTITUTIONAL THAT A THREE-JUDGE COURT IS NOT REQUIRED TO BE CONVENED

The United States Court of Appeals for the Fifth Circuit cited *Bailey v. Patterson*, 369 U.S. 31(1963), and *Alabama ACLU v. Wallace*, 456 F2d 1069(CA5, March 3, 1972), as its authority that determination of the constitutionality of Act No. 1418 did not require the convening of a three-judge court.

Bailey was based on the proposition that the question of nonsegregated service in interstate and intrastate commerce had been settled by prior decisions of this Court.

Alabama ACLU was predicated on the proposition that the non-validity of Bible-reading statutes had been established by prior decisions of this Court.

As to Act 1418, there has been no prior decision of this Court invalidating any statute of similar import, or language. The lower court relied on *Swann v. Charlotte-Mecklenburg Board of Education*, 312 FSupp 503(1970); affirmed on direct appeal, 402 US 43(1971).

The pertinent portion of North Carolina General Statutes § 115-1761.1 involved is:

> "No student shall be assigned or compelled to attend any school on account of race, creed, color or national origin, or for the purpose of creating a balance or ratio of race, religion or national origins. Involuntary bussing (sic) of students in contravention of this article is prohibited, and public funds shall not be used for any such bussing (sic)."

In the first place, the language of this statute does not approximate the language of Act No. 1418!

Further, the language of this Court in *North Carolina Board of Education v. Swann*, 402 US 43 (1971), must be examined:

> "The legislation before us flatly forbids assignment of any student on account of race or for the purpose of creating a racial balance or ratio in the schools. The prohibition is absolute, and it would obstruct the remedies granted by the District Court in the Swann case.*** At 402 US 45.
>
> • • •
>
> "We likewise conclude that an absolute prohibition against transportation of students assigned on the basis of race, 'or for the purpose of creating a balance or ratio,' will similarly hamper the ability of local authorities to effectively remedy constitutional violations.***" At 402 US 46.

Compare *Moore v. Charlotte-Mecklenburg Board of Education*, 402 US 47 (1971).

Act No. 1418 does NOT, it is submitted, on its face hamper the ability of local authorities to remedy effectively constitutional violations. Act No. 1418 was interpreted in the state court as containing the requirement

that the parental determination be made in good faith and be factually correct; the hearing court further concluded in its final decrees that being factually correct there was a risk to health or safety of the child or that there was a significant impingement on the educational process. This, then, was NOT an unfettered "freedom of choice" reposing in the parents.

The language of Act 1418 is comparable to that in the Education Amendments of 1972. Title VIII, Section 802(a), entitled "Prohibition Against Use Of Appropriated Funds For Busing", reads in part:

> *"****No such funds shall be made available for transportation when the time or distance traveled is so great as to risk the health of the children or significantly impinge on the educational process of such children,****"* (Emphasis supplied).

See Conference Report, Report No. 92-798, 92nd Congress, 2nd Session, Senate (To accompany S.659), p. 146. Act 1418 parallels this language, and, as interpreted by the Alabama court, permits a good faith, factual determination to be made by the parent or legal guardian of a school child.

It is submitted the constitutional issue cannot be denominated as "frivolous".

Inter alia, the Court should be made aware that Linda Stout possessed knowledge of the issuance of the fiat in the state court on October 18, 1971, for she filed her MOTION FOR EMERGENCY RELIEF on October 26, 1971.

Alabama procedure is very clear that Linda Stout could have intervened in the state court cases, if she so desired. See Equity Rule 37 (Appendix "B", p. B-3). However, she permitted those proceedings to terminate in final decrees on November 1, 1971, which final decrees upheld the constitutionality of Act No. 1418.

The state court of Alabama was competent to pass upon the federal constitutional question involved. There was no intervention by Linda Stout, and had she intervened she could have appealed to the Supreme Court of Alabama, and, in the event of an adverse decision there, the road to this Court was all green lights.

There are present, then, overtones of a federal district court review of a final determination by a state court of a federal question. See *Brown v. Chastain*, 416 F2d 1012 (CA5, 1969); *Rooker v. Fidelity Trust Co.*, 263 US 413 (1923); *Eitel v. Faircloth*, 311 FSupp 1160 (DC, SD, Fla, 1970). This dual jurisdiction was invited to the attention of the lower court by the Jefferson County Board of Education in one of its responses to the ORDER of October 29, 1971.

In a word, the proceedings in the lower court were developed so haphazardedly, without these petitioners here being made parties, that it is impossible to ascertain what actually transpired.

Such proceedings do not, and cannot, comport with the well-disciplined jurisdiction and procedure of a United States District Court.

CONCLUSION

It is submitted that in the interest of a reasonably certain method of procedure in the United States District Courts, and one which follows Article III, United States Constitution, that this Court should issue the writ, and decide the questions presented after full briefing and argument.

Respectfully,

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OCTOBER, 1972

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 72-1120*

LINDA STOUT, ET AL.,
Plaintiffs,

UNITED STATES OF AMERICA,
Plaintiff-Intervenor-Appellee,

CHARLES OWENS, ET AL.,
Movants-Appellants

versus

JEFFERSON COUNTY
BOARD OF EDUCATION, ET AL.,
Defendants-Appellees

(September 7, 1972)

Before THORNBERRY, CLARK, and INGRAHAM, Circuit Judges.
BY THE COURT: * * *

NO. 72-1102 is AFFIRMED. *See Bailey v. Patterson*, 369 U.S. 31 (1962); *Alabama ACLU v. Wallace*, 456 F.2d 1069 (5th Cir., 1972).

*The United States Court of Appeals for the Fifth Circuit consolidated three other cases with the present one, either at the suggestion of the parties, or by the Court for its own convenience. All of the cases relate to desegregation of the schools operated by the Jefferson County Board of Education. Petitioners have included here only that portion of the opinion which pertains to the Alabama statute concerning busing of students. Pertinent portions of the opinion and order of the United States District Court are included hereafter.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

LINDA STOUT, et al.,	)	
Plaintiffs	)	
—vs.—	)	CIVIL ACTION
JEFFERSON COUNTY BOARD OF EDUCATION, et al.,	)	NO. 65-396
Defendants	)	

MEMORANDUM OF OPINION AND ORDER

This proceeding, ancillary to the Jefferson County school desegregation case which has been pending in this court and federal appellate courts since 1965, involves the effect of recent actions of Alabama's legislative, executive and judicial branches upon a portion of the desegregation plan ordered by this court. The procedural questions presented in this proceeding make appropriate a brief chronology of the events leading to this order:

* * * * *

September 23, 1971. "Anti-busing law," Act No. 1418, Regular Session of Alabama Legislature, signed into law by Governor. According to this statute, "No student shall be denied admission to any public school in this state when, in the determination of such child's parents or legal guardian, the time or distance of travel to another school is so great as to risk the health or safety of the child or significantly impinge on the edu-

"cational process. Upon a determination being made that the time or distance of travel to another school is so great as to risk the health or safety of the child or significantly impinge on the educational process, the parent or guardian shall make written application to the authorities of the school to which the child is to be admitted, and the school authorities shall thereupon admit said child."

* * * * *

III. THREE-JUDGE COURT UNNECESSARY

Proceedings to enjoin the operation of state statutes for conflict with the national Constitution typically requires the empanelling of a three-judge court. 28 U.S.C. §§ 2281, 2284. This procedure is not, however, required when, as here, prior decisions make frivolous any claim that the state statute on its face is not unconstitutional. *Bailey v. Patterson*, 369 U.S. 31, 33 (1962). Such a panel was held to be unnecessary in a recent decision invalidating an earlier, but similar, Alabama "freedom-of-choice" statute:

> The settled state of the law convinces us that there is no substantial federal question presented in this case. Where . . . the subject Act conflicts with an order of a federal court drawing its authority from the Fourteenth Amendment, the Act is unconstitutional and must fail. The supremacy clause of our compact of government will admit to no other result. *State of Alabama v. United States*, 314 F. Supp. 1319 (S.D.Ala.1970)[6]

6. Also see footnote 17, 314 F.Supp. at 1323. The case *sub judice* involves a proceeding against county school authorities.

Also see the cogent opinion by Judge Lawrence in *Stell v. Savannah-Chatham Board*, ___F.Supp.___ (S.D.Ga. 1971) (November 19, 1971; No. 1316) (holding unconstitutional a recent freedom-of choice statute passed by the Georgia legislature).

Given the consistent record of past Alabama school statutes in the federal forum, which need not be recited here, one may wonder why still another should wind its way through the legislative processes at this late date. The answer lies in the rather disingenious extraction of one sentence from the *Swann* decision and its remolding into statutory form. The sentence in question is the following:

> Any objection to transportation of students may have validity when the time or distance of travel is so great as to risk either the health of the children or significantly impinge on the educational process. 402 U.S. at 30-31.

The distortion comes from conveniently overlooking that this "objection" was not set up as one of controlling significance to be applied by parents, but rather one of a number of factors to be considered in the adoption of an overall attendance plan initially by a school board and subsequently by the federal court. As previously indicated, footnote 5, *supra*, the Charlotte-Mecklenburg plan approved by the Supreme Court in *Swann* involved student assignments which, on the average, added 7 miles distance beyond the "neighborhood" school, the Court remarking that "desegregation plans cannot be limited to the walk-in school." 402 U.S. at 30.

On analysis, the new Alabama statute, which on its face[7] gives parents the absolute right to require school boards to assign their children to schools other than those prescribed under a desegregation plan, is but a "freedom-of-choice" option dressed in slightly different clothing. Such options have been previously ruled out for the Jefferson County school system, at least until a unitary system has been in operation for a sufficient length of time to escape the tendency such option would have towards re-establishing a dual system.[8] *United States v. Jefferson County Board.* 417 F.2d 834

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7. The state court decisions purport to find not only that the parents made a "determination" under Act No. 1418, but also that various factors listed as grounds therefor were true. Nothing in the statute would require such an evaluation, and in the cases before the state court such findings were made without any evidence being offered even though such matters were not admitted in the pleadings. See footnote 3 *supra* regarding the "verification" of the state court complaints.

8. This is not to say that attendance zone plans must eliminate all choice. Rather, provisions allowing optional "majority-to-minority" transfers are standard in this circuit and were approved in *Swann.* Likewise, another standard provision in this circuit permits transfers between two school systems where the cumulative effect does not in either system reduce desegregation. See *Stout v. Jefferson County School Board, sub nom., Singleton v. Jackson Municipal Separate School District,* 419 F.2d 1218 (5th Cir. 1970). Also see 419 F.2d 1221 (Bibb County, Georgia, system). The key is that the transfer options must be so conditioned or limited as to avoid any interference with the process of conversion into a unitary system. See *Lemon v. Bossier Parish School Board,* ___F.2d___(5th Cir. 1971) (August 24, 1971; No. 71-2523): "New sprouts permitting freedom of choice of schools, classes and subjects, which might even remotely tend to perpetuate segregation, must not be allowed to bud."

(5th Cir. 1969); *Cf. United States v. Jefferson County School Board*, 372 F.2d 836,889 (5th Cir. 1966), 380 F.2d 385 (5th Cir. 1967) ("a schoolchild has no inalienable right to choose his school"). Also see *State of Alabama v. United States*, 314 F.Supp.1319 (S.D.Ala. 1970).

The fate of Act 1418, if not determined by cases involving earlier Alabama statutes, is clearly fixed by the Supreme Court's decision in *North Carolina State Board of Education v. Swann*, 402 U.S. 43, issued on the same day as the basic *Swann* decision. There, in a case involving machinations of the three branches of government of North Carolina quite similar to those of Alabama in the present dispute, the Supreme Court invalidated North Carolina's Anti-busing statute. Speaking for a unanimous court, the Chief Justice said:

> (I)f a state-imposed limitation on a school authority's discretion operates to inhibit or obstruct the operation of a unitary school system, it must fall; state policy must give way when it operates to hinder vindication of federal constitutional guarantees. The legislation before us flatly forbids assignment of any student on account of race or for the purpose of creating a racial balance in the schools. The prohibition is absolute, and it would inescapably operate to obstruct the remedies granted by the District Court in the *Swann* case. . . . We likewise conclude that an absolute prohibition against transportation of students assigned on the basis of race, "or for the purpose of creating a balance or ration," will similarly hamper the ability of local authorities to effectively remedy constitutional violations. 402 U.S. at 45-46.

Portions of the opinion of the district court[9] regarding North Carolina law are particularly pertinent to Alabama Act No. 1418: "The flaw in this legislation is its rigidity." (312 F.Supp. at 508)

"We merely hold today that North Carolina may not validly enact laws that prevent the utilization of any reasonable method otherwise available to establish unitary school systems." (312 F. Supp. at 510). So here, the vesting in parents of absolute rights to negate school assignments made by school authorities operating under the review of the federal courts inescapably operates to obstruct an effective remedy for constitutional violations.

IV. REMEDY

The District Court, upon learning that a state court has enjoined a school board from implementing a desegregation plan ordered by the federal courts, is to take immediate action, through use of the injunctive process or otherwise, to the end that the board may implement such plan. *Lockett v. Muscogee County Board*, __F. 2d __(5th Cir. 1971) (August 30, 1971,No.71-2490). Also see *North Carolina State Board of Education v. Swann*, 402 U.S. at 44, footnote 2.

* * * * *

V. ORDER

On the findings and conclusions above indicated, it is hereby ORDERED:

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9. The North Carolina district court concluded that a three-judge panel was necessary. The case *sub judice* comes 20 months and many decisions (including the Supreme Court's *Swann* opinions), later.

1. That Alabama Act No. 1418, 1971 Regular Session, be, and it hereby is, declared unconstitutional.

• • •

3. That Charles Owens *** (and others) be, and they hereby are, enjoined from enforcing, seeking to enforce, or relying upon, Alabama Act No. 1418, and from further prosecuting, defending, or otherwise being bound by Cases Nos. 168-139 and 168-140, presently pending in the Circuit Court for the Tenth Judicial Circuit of Alabama in Equity. ***.

• • •

DONE AND ORDERED this the 3rd day of December, 1971.

s/Sam C. Pointer, Jr.
United States District Judge

I.

CONSTITUTION OF THE UNITED STATES, ARTICLE III, SECTION 2 (IN PART):

Section 2. The judicial power shall extend to all cases, in law and equity, arising under this constitution, the laws of the United States, ***.

II.

TITLE 28, SECTION 1254(1), UNITED STATES CODE:

Cases in the courts of appeal may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;***

III.

TITLE 28, SECTION 1446(a), UNITED STATES CODE:

(a) A defendant or defendants desiring to remove any civil or criminal prosecution from the State court shall file in the district court of the United States for the district and division within which such action is pending a verified petition containing a short and plain statement of the facts which entitle him or them to removal together with a copy of all process, pleadings and orders served upon him or them in such action.

* * *

(e) Promptly after the filing of such petition and bond the defendant or defendants shall give written notice

thereof to all adverse parties and shall file a copy of the petition with the clerk of such State court, which shall effect the removal and the State court shall proceed no further unless and until the case is remanded.

* * *

IV.

TITLE 28, SECTION 2281, UNITED STATES CODE:

An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under the State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title.

V.

TITLE 28, SECTION 2283, UNITED STATES CODE:

A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

VI.

TITLE 28, SECTION 2284, UNITED STATES CODE:

In any action or proceeding required by Act of Congress to be heard and determined by a district court of three

judges the composition and procedure of the court, except as otherwise provided by law, shall be as follows:

(1) The district judge to whom the application for injunction or other relief is presented shall constitute one member of such court. On the filing of the application, he shall immediately notify the chief judge of the circuit, who shall designate two other judges, at least one of whom shall be a circuit judge. Such judges shall serve as members of the court to hear and determine the action or proceeding.

(2) If the action involves the enforcement, operation or execution of State statutes or State administrative orders, at least five days notice of the hearing shall be given to the governor and attorney general of the State.

* * *

Such notice shall be given by registered mail or by certified mail by the clerk and shall be complete upon the mailing thereof.

* * *

VII.

EQUITY RULE 37, CODE OF ALABAMA, 1940, TITLE 7:

Intervention. By petition filed by leave of court on motion, and on notice to the parties of record of the hearing of the motion as prescribed by the court, any one shall be permitted to intervene in a suit when the representation of the petitioner's interest by existing parties is or may be inadequate, and the applicant is or may be prejudiced by a decree in the suit or when the applicant is so situated as to be adversely affected by a

distribution or other disposition of property in the custody of the court or an officer thereof; or on other grounds which the court may deem sufficient.

The petition shall set forth the ground for intervention and the facts supporting them; and the court shall prescribe in the order allowing the filing, the time allowed other parties to demur to or to answer the petition if so advised, and testimony may be taken thereon, if the averments require proof.